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Supreme Court

of the

United States

OCTOBER TERM, 1969

No. 931

MARTIN LEMLICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes Now MARTIN LEMLICH, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on the 14th day of October, 1969, and the Order of the said Court denying re-hearing entered on November 11, 1969.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A hereof; the Judgment is found in Appendix B hereof; and the advice to counsel as to the Order denying rehearing is found in Appendix C hereof. The decision and opinion of the Court of Appeals for the Fifth Circuit is officially reported in ____F.2d____.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I

CAN A COURT REQUIRE A CRIMINAL DEFENDANT TO DISCLOSE, BEFORE A JURY, WHETHER OR NOT HIS ATTORNEY VOLUNTARILY HAD ADVISED THE GOVERNMENT AS TO ALL HIS POSSIBLE DEFENSES DURING PRE-INDICTMENT CONFERENCES HELD OUTSIDE THE PRESENCE OF THE DEFENDANT.

II

WHERE THE ATTORNEY FOR A POTENTIAL CRIMINAL DEFENDANT IS SILENT AT PRE-INDICTMENT CONFERENCES AS TO POSSIBLE DEFENSES, AND THE GOVERNMENT AT TRIAL QUESTIONS THE DEFENDANT AS TO WHETHER HE HAD KNOWLEDGE OF SUCH SILENCE, IS THE USE OF SUCH SILENCE BY THE GOVERNMENT A VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE 6TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS TO DEPRIVE THE DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE CASE

The petitioner, MARTIN LEMLICH, was accused in a 20 Count Information filed by the United States Attorney for the Southern District of Florida, Case No. 68-136-Cr-CA, charging him with wilfully and knowingly failing to file various Federal employment tax returns, Form 941, as president of various corporations and on behalf of himself, individually, in violation of Title 26, U.S.C. Section 7203. Following a jury trial, your petitioner was convicted on all 20 counts.

A judgment of conviction and commitment was entered on April 16, 1969, and the petitioner sentenced to imprisonment for a period of sixty (60) days as to Count I, and imposition of sentence of confinement on the re-

maining 19 counts was withheld, and upon discharge from confinement placed on probation for a period of two (2) years.

The petitioner appealed therefrom and duly perfected said appeal. Pursuant to Local Rule 18 of the Court of Appeals for the Fifth Circuit, the appeal was transferred to the summary calendar for disposition on the 6th day of October, 1969, and on the 14th day of October, 1969 the Court of Appeals for the Fifth Circuit entered its per curiam opinion affirming the conviction.

A timely Petition for Rehearing was filed, which petition was denied on the 11th day of November, 1969.

REASONS FOR GRANTING THE WRIT

The reason relied upon for the issuance of the Writ is as follows:

It is of extreme Federal importance in the field of criminal jurisprudence as to whether a prospective defendant's attorney in attending conferences on behalf of his client is required to advise Governmental agents or attorneys as to any defenses that will be raised, if and when a trial ensues.

It appears that the question raised herein is a point of first impression. During the trial, the trial court, over the objection of the defendant, permitted Government counsel to question the defendant as to what transpired or what his attorney advised him had transpired at conferences which his attorney attended (without his presence) before representatives of the Internal Revenue Service and/or United States Department of Justice.

The defendant's defense to the charge of wilfully failing to file employment tax returns timely was that he was not aware that such returns could be filed without remittance, and the record was clear that the defendant was having serious financial difficulties during the periods involved herein. As stated above, the United States Attorney was permitted, over objection of the defendant, to ask the defendant whether or not to his knowledge his attorney had ever advised any representatives of the Government that the defendant had not filed the returns involved because he was not aware he could file said returns without remittance, and the defendant's reply was that his attorney had not advised him anything except that "He struck out".

This improper questioning could only leave the jury with one inference, that being that the defendant's defense was a frivolous defense thought up at the eve of trial.

If the defendant had attended these conferences and had been asked what his defenses were, but refused to answer said question upon the advise of his counsel, there is no doubt that this could not be brought to the jury's attention. Yet, in the instant case the Government has brought to the attention of the jury not the defendant's silence on his counsel's advice, but the silence of his counsel, and has implied that this silence is an act of the defendant.

It is basic constitutional law that the right to counsel under the 6th Amendment to the Constitution of the United States includes the right to effective assistance of counsel. An attorney representing a prospective crimi-

nal defendant must make his own decision when attending conferences as to whether or not he will voluntarily advise the Government agents or attorneys at that time what defenses will be raised, if and when the matter is tried, and there is no law that requires any defenses to be raised prior to trial. The questioning by the Government of a defendant as to whether or not his attorney advised the Government prior to trial as to his defenses, when there is no duty or requirement for the attorney to do so, clearly is a deprivation of the defendant's right to the effective assistance of counsel since it should be clear that an attorney cannot effectively assist or represent his client if his leaving things unsaid can then be used against the client at trial.

It is true that an attorney acting under a Power of Attorney can bind his client by incriminating statements, but it is inconceivable that his attorney's silence can bind his client and give a jury an adverse, prejudicial inference. It should be brought to the Court's attention that in criminal tax investigations prospective defendants and/or their counsel are invited to conferences and the Internal Revenue Service and as a matter of courtesy, upon request can have a conference before the United States Department of Justice prior to the matter being forwarded to a United States Attorney for further action.

Many cases are disposed of at these conferences and these conferences are to the advantage of the prospective defendant, but also work to the advantage of the Government, and to permit an attorney's silence to be used against his client would not only be a violation of his client's rights, but would seriously hinder conferences and the disposition of cases in the criminal tax field.

There should be a substantial doubt as to whether or not this questioning was without probable, substantial inference upon the jurisdiction of the jury, and this Court should endeavor to apply the rule as it stated in **Kotteatos** v. **United States** of America, 320 U.S. 750, 764:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm, or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

CONCLUSION

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit erred in the entry of the opinion herein and in the Order denying Petition for Rehearing herein, and that the Writ herein sought should be issued and the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

HAROLD HELLER
Suite 822
19 West Flagler Street
Miami, Florida 33130

By _____
Sidney A. Soltz
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to the Solicitor General of the United States, United States Department of Justice, Washington, D. C., this ____ day of December, 1969.

Sidney A. Soltz
Of Counsel

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27822
Summary Calendar

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN LEMLICH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(October 14, 1969)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM: Appellant was convicted on twenty counts of failure to file Employer's Quarterly Tax Returns (Form 941) for most of the period 1962 through 1964 for his law practice and for various corporations of which he was president.

Pursuant to Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have

directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service*, 409 F.2d 804 (5th Cir. 1969).

Appellant urges that he was entitled to a judgment of acquittal because he lacked the necessary intent. This argument springs from several factual matters. He says that he furnished W-2 forms to employees of the taxpayer, which arguably revealed to the government the employer's tax liability. There was also evidence that he lacked the ability to pay the tax and that he was unaware that he could file the returns without a remittance. Wilfulness in failing to file the quarterly returns was for the jury. *United States v. Johnson*, 386 F.2d 630 (3rd Cir. 1967); *Barrett v. United States*, 296 F.2d 309 (5th Cir. 1961); *Contreras v. United States*, 213 F.2d 96 (5th Cir. 1954).[1]

In argument defense counsel referred to various acts of appellant regarding preparation and filing of returns. The court then advised counsel he proposed to charge the

[1]Appellant relies upon United States v. Power, 68-2 USTC 9443 (S.D. Wis., not officially reported). That case contains language which implies that inability to pay tax, coupled with a "full disclosure" of tax liability by sending W-2 forms to employees, so negated intent as to entitle the defendant to a judgment of acquittal. If *Power* means there can be no wilful failure to file a return merely because a taxpayer puts in the hands of employees W-2 forms which, if all reach the government, will disclose the fact and the extent of taxpayer's liability, then we do not agree with it. In any event the evidence does not show a uniform pattern of appellant putting W-2's into the hands of employees. Some were returned for wrong addresses and in at least one instance a former employee was able to obtain a W-2 only by telephonic insistence that it be sent. The sending of W-2's is evidentiary of an intent not to conceal tax liability, but it does not reach the status of requiring acquittal for failure to file the employer's return.

jury on the effect of these acts as evidence of intent, and subsequently the court did give a correct and limiting charge on that subject. Appellant asserts that reversal is required by Rule 30, Fed. R. Crim. P., providing that "[t]he Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury," and *Loveless v. United States*, 260 F.2d 487 (D.C. Cir. 1958). Defense counsel did not offer any proposed instructions at the charge conference and did not object to any proposed charges. The charge given did not limit or restrict the argument of defendant but, to the contrary, limited the probative effect of the prior acts to which defense counsel had referred in his argument, which was to the advantage of defendant. In *Loveless* the court had indicated it would not give certain instructions, and relying thereon the defense did not argue the lesser offense of manslaughter, then after argument the court notified counsel he had changed his mind and considered a charge on manslaughter essential.

There is no merit to the contention that the hearsay rule and attorney-client privilege were violated by asking defendant whether his attorney, holding a power of attorney to represent appellant before the governmental agency, had asserted in conference with the government the defense that appellant had no knowledge that he could file a return without a remittance.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27822

D. C. Docket No. 68-136-CR-CA
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN LEMLICH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 14, 1969

Issued as Mandate:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27822
Summary Calendar

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN LEMLICH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(November 11, 1969)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

Petition for Rehearing Filed 10/24/69

Petition for Rehearing Denied 11/11/69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 931

MARTIN LEMLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after a jury trial in the United States District Court for the Southern District of Florida, on twenty counts charging willful failure to file employer's quarterly tax returns (Form 941), in violation of 26 U.S.C. 7203 (Pet. App. 1; R. 3). His defense was that his failure to file said returns was not willful or with an evil motive because, he testified (R. 46–49), he lacked the funds needed to pay the taxes involved and believed that he could not file such returns without also making payments. That defense was considered by the jury under proper instructions, and was rejected. On appeal the conviction was affirmed (Pet. App. 1–3).

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Petitioner does not now contend that the evidence was insufficient to support his conviction. Rather, his sole claim is that his Sixth Amendment right to the effective assistance of counsel (Pet. 5) was infringed when government counsel, in cross-examination, asked him whether his attorney had ever told him that, at pre-indictment conferences with Internal Revenue Service officials (R. 58), he had "raised the question of the fact that you did not think you could file these without paying money * * *" (R. 60). Petitioner's reply was as follows (R. 60): "He didn't tell me what he had discussed there. He merely said that he struck out pretty well, and he didn't think that he had done any good, that is all."

Government counsel then immediately turned to another subject (R. 60), and the matter was not pursued any further.

Petitioner concedes that "the question raised herein is a point of first impression" (Pet. 4) and that an attorney acting, as here (see R. 58), under a power of attorney "can bind his client by incriminating statements" (Pet. 6), but asserts that "it is inconceivable that his attorney's silence can bind his client and give a jury an adverse, prejudicial inference" (Pet. 6).

Even assuming that there is merit to the contention that an attorney should feel free to conceal his client's explanations or defenses at conferences preceding a final decision by the IRS to recommend prosecution and that, consequently, a jury should not be invited to consider any failure by counsel to mention a defense at such a conference, there is no foundation for the

claim of error made by petitioner on the facts of this case. Here the jury, in view of petitioner's answer to the question posed about his attorney's discussions with IRS officials (*supra*, p. 2), never learned whether or not the defense involved had been mentioned by the attorney. They were thus given no basis for any inference unfavorable to petitioner in regard to his asserted defense.

Moreover, even if there were a suitable foundation for the claim, petitioner's contention would nonetheless be without merit, since proof of intent or knowledge in criminal cases frequently consists of evidence that the defendant remained silent at a time when, as the jury might infer, an innocent person would have offered some explanation. The same logic would apply where an explanation could reasonably be expected from an attorney specifically authorized to represent a taxpayer during a pre-indictment period when a reasonable explanation might obviate prosecution entirely. And if the attorney withheld explanations or defenses for purely tactical reasons, he would be free to testify to that effect at trial, thus erasing any adverse inference which might otherwise be drawn.

It should also be noted that, although petitioner's counsel, prior to the question and answer now complained of, objected "to anything in light of what happened in these conferences" (R. 58–59), he failed to make known to the trial court the grounds of his objection as required by Rule 51, F.R. Crim. P. And, after the question was asked, petitioner's counsel reg-

istered no further objection, failed to move to strike the question or answer, and (so far as appears from the record) requested no curative instruction (see Rule 30, F.R. Crim. P.). Finally, petitioner never presented his current Sixth Amendment contention to the court of appeals, where his claim—rejected by that court—was simply that "the hearsay rule and attorney-client privilege were violated" (Pet. App. 3).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970